

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SARAH BENNETT and SMITHSONIAN INSTITUTION,
Washington, D.C.

*Docket No. 96-2237; Submitted on the Record;
Issued July 9, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on October 5, 1995.

On November 10, 1993 appellant, then a 38-year-old security guard, filed a notice of traumatic injury alleging that she sustained a back injury when she stumbled while descending a ladder in the course of her federal employment duties. On March 17, 1994 appellant filed a claim for a recurrence of disability. On April 11, 1994 the Office accepted appellant's claim for a lumbar strain and paid appropriate compensation benefits. On March 23, 1995 the Office additionally accepted appellant's claim for a recurrence of disability.

On May 22, 1995 appellant filed a second claim for a recurrence of disability. In a decision dated June 6, 1995, the Office denied appellant's claim on the grounds that the medical evidence of record was insufficiently rationalized to support a causal relationship between appellant's accepted lumbar strain and the diagnosed lumbar disc syndrome which formed the basis of her claim.

On June 14, 1995 appellant requested reconsideration of the Office's June 6, 1995 decision and submitted additional medical evidence in support of her claim.

In a merit decision dated July 6, 1996, the Office determined that the record contained no substantial and probative medical evidence which clearly established that appellant's back condition, her lumbar disc syndrome, resulted from the November 10, 1993 employment incident.

By letter dated July 12, 1995, appellant requested reconsideration of the Office's decision. In support of her request, appellant submitted medical progress notes dated March 27, April 17, May 10, May 17, June 13, July 11 and August 1, 1995, from Dr. Rida N. Azer, a Board-certified orthopedic surgeon and her attending physician. Appellant also submitted a

May 15, 1995 treatment note from Dr. Daniel R. Ignacio, a Board-certified physiatrist, to whom appellant was referred by Dr. Azer, and June 6 and September 5, 1995 treatment notes from Dr. Hampton J. Jackson, Jr., and Dr. William Dorn, both Board-certified orthopedic surgeons and associates of Dr. Azer.

In a decision dated October 5, 1995, the Office noted that because appellant's request for reconsideration neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant a review of the prior decision. The Office specifically found that although Drs. Azer and Dorn continued to maintain that appellant's lumbar disc syndrome was the result of her November 10, 1993 employment injury, neither physician discussed or provided reasoned medical evidence to support this conclusion and therefore, the medical evidence was essentially repetitious of evidence previously considered by the Office. Accordingly, the Office denied appellant's request for reconsideration. The Office's decision included a notification to appellant that an appeal to the Employees' Compensation Appeals Board was her only right of appeal.

By letter dated December 4, 1995, appellant requested reconsideration of the Office's prior decision and submitted additional medical evidence in support of her claim.

In a letter dated January 19, 1996, the Office again informed appellant that it had no further jurisdiction in her case and, therefore, could not consider her request or review the additional medical evidence submitted therewith.

By letter postmarked July 18, 1996 and received July 22, 1996, appellant filed the instant appeal.

The only decision before the Board on this appeal is that of the Office dated October 5, 1995 in which it declined to reopen appellant's case on the merits as she failed to submit new relevant and pertinent evidence. As more than one year elapsed from the date of issuance of the Office's last merit decision on July 6, 1995 the date of the filing of appellant's appeal, the Board lacks jurisdiction to review that decisions.¹

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on October 5, 1995.

¹ See 20 C.F.R. § 501.3(d).

Under section 8128(a) of the Act,² the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,³ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴

In support of her reconsideration requests, appellant attempted to submit relevant and pertinent evidence not previously considered by the Office, consisting of progress notes from Drs. Azer, Jackson, Ignacio and Dorn. Dr. Ignacio stated in his report dated May 15, 1995 that appellant had slipped and twisted her body on November 10, 1993. Dr. Azer stated in his June 13 and July 11, 1995 reports that appellant’s lumbar disc syndrome, her treatment and her residuals were all caused by her November 10, 1993 injury, and Dr. Dorn stated in his September 9, 1995 report that appellant “sustained injuries in the course of her employment.” This information is not relevant to the issue for which the Office denied appellant’s claim, the lack of rationalized medical evidence⁵ explaining the causal relationship between appellant’s accepted employment incident and her diagnosed condition. Therefore, the newly submitted medical evidence is insufficient to require the Office to reopen appellant’s claim for review of the merits pursuant to section 10.138(b)(1)(ii).

As appellant failed to submit new relevant and pertinent evidence not previously reviewed by the Office, and failed to raise any error of fact or law in the prior decision, the Office did not abuse its discretion by refusing to reopen appellant’s claim for review of the merits.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Ern Reynolds*, 45 ECAB 690 (1994).

The decision of the Office of Workers' Compensation Programs dated October 5, 1995 is hereby affirmed.⁶

Dated, Washington, D.C.
July 9, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁶ The Board notes that the record contains new medical evidence submitted with appellant's December 4, 1995 request for reconsideration. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). The Board may not review new evidence on appeal which was not considered by the Office in the decision.

Therefore, the Board is precluded from reviewing this evidence.